Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT C. KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 13, 1999

62 pp

QUESTION PRESENTED

Whether the court of appeals' affirmance of the trial court's decision to increase a criminal sentence on the basis of the defendant's status as a naturalized citizen violates the Fifth Amendment's guaranty of equal protection and conflicts with the decisions of the Second, Eighth and Ninth Circuits.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert C. Kim asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 14a-37a) and the final judgment and order of the United States District Court for the Eastern District of Virginia (App. 1a-13a) are unreported. [1]

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. V, provides in part:

> "Nor person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The Court of Appeals in this case held that it was constitutionally permissible for the sentencing court to consider the defendant's status as a naturalized citizen in imposing sentence. This holding violates petitioner's right under the Fifth Amendment to equal treatment under the law.

---

[1] References to "App." are to the Appendix submitted herewith.

A. District Court Proceedings.

Robert C. Kim pleaded guilty to conspiracy to gather national security documents with the intent to provide them to a South Korean naval officer, in violation of 18 U.S.C. §§ 793(b) & (g).

Kim became a naturalized citizen of the United States in 1974, having emigrated from South Korea in 1966. He is 59 years old, with a wife and three children. Before the incident that led to his guilty plea, he spent 19 years as a computer specialist at the Office of Naval Intelligence, during which he received several commendations and citations for meritorious service. *See* App. 31a.

As part of his sentencing submissions, Kim provided a written apology to the court. Among the numerous general apologies Kim made in that letter, he included one sentence apologizing to Korean Americans who may have been injured in their reputations as a result of his actions.

At the sentencing hearing, the government argued for the imposition of the maximum sentence possible, based on its assertion that Kim's crime was all the more serious due to his status as a naturalized citizen. The government decried Kim's apology to Korean Americans, accusing him of ingratitude toward the United States:

> "He doesn't apologize to all the people in the United States who worked to give him -- to grant his application for citizenship, give him a place to come over and have an education and to start a new life. . . . He apologizes to Korean Americans. That's his words. He wants to single out Korean Americans for his apology, Korean Americans. . . . He owes this country his complete loyalty and fidelity, and he betrayed us. . . . He damaged the national security of the country that gave him citizenship, and for that betrayal, Your Honor, he deserves the toughest

sentence that this Court can give him today." App. at 30a-31a. (emphasis added).

Although the court acknowledged that Kim "may not have had the evil purpose of hurting the United States directly . . .", App. at 33a, it adopted the government's view that Kim's status as a naturalized citizen was relevant, chastised Kim for breaking his citizenship oath, and stated that its sentence was a message to other naturalized citizens:

> "You had taken an oath of allegiance to this country when you became a citizen, and in part of that oath . . . is the cutting off of obedience to theforeign country of birth. The new part of the oath is accepting the new life as an American citizen.
>
> * * *
>
> And you breached that oath that you took many years ago . . .
>
> * * *
>
> The Court must take into consideration as well the message that is sent out to others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States. . . . I am therefore sentencing you, having considered all these factors, to the high end of the guideline range." App. at 33a-34a.

The district court thus sentenced Kim to the maximum possible sentence of 108 months, in part because of (1) Kim's violation of his oath of loyalty as a naturalized citizen; and (2) the Court's desire to "send a message" to other naturalized citizens.

B. Proceedings in the Fourth Circuit.

On appeal, petitioner argued that the trial court should not have considered petitioner's status as a naturalized citizen in imposing sentence.[2] The Fourth Circuit rejected this argument and affirmed the district court's sentence on the ground that the district court imposed sentence based on petitioner's violation of the oath of allegiance taken in gaining citizenship, rather than his status as a naturalized citizen. *See* App. 42a. The Fourth Circuit concluded that the violation of petitioner's oath of citizenship was a permissible consideration in sentencing. *Id.*

REASONS FOR GRANTING THE WRIT

This petition should be granted because the Fourth Circuit's decision (1) violates petitioner's right to equal protection by exposing him to a harsher sentence than a citizen by birth would be exposed to for precisely the same crime, and (2) conflicts with decisions of the Second, Eighth, and Ninth Circuits that forbid the consideration of such factors in sentencing.

---

[2] In his plea agreement, Kim waived the right to appeal any sentence within the statutory maximum "on any ground whatsoever." However, as correctly noted by the Court of Appeals -- and not disputed by the government -- this waiver "does not preclude the defendant from appealing a sentence which is . . . based on constitutionally impermissible factors." *See* App. at 41a. The instant appeal involved precisely such an issue, and therefore has not been waived.

I. THE FOURTH CIRCUIT'S DECISION VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AMENDMENT.

By affirming the enhancement of petitioner's sentence based on the violation of his citizenship oath, the Fourth Circuit's decision allows invidious discrimination on the basis of status as a naturalized citizen.[3] For naturalized citizens, the oath of allegiance is a prerequisite to achieving the status that other citizens gain by birth. Yet both naturalized citizens and citizens by birth are held to the same standards of loyalty to the United States, and are equally prohibited from divulging classified information to foreign powers. By affirming the district court's enhancement of petitioner's sentence based on violation of his citizenship oath, the Fourth Circuit has, for all practical purposes, sanctioned the consideration of a defendant's citizenship status in sentencing. Furthermore, because every naturalized citizen has by necessity taken an oath of loyalty, imposing harsher sentences on naturalized citizens based on violation of this oath exposes them to harsher sentences than would be imposed on citizens by birth for precisely the same crimes.

This is constitutionally impermissible. This Court has repeatedly affirmed that "the rights of citizenship of the native born and of the naturalized person are of the same

---

[3] Equal protection under the laws of the United States is guaranteed by the due process clause of the Fifth Amendment to the same extent that equal protection under the laws of the states is guaranteed by the Fourteenth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 676, 638 n.2 (1978); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

dignity and are coextensive." *See Schneider v. Rusk,* 377 U.S. 163, 165 (1964). Barring fraud in obtaining his or her status, a naturalized citizen "'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.'" *Id.* at 166 (quoting *Osborn v. Bank of the United States,* 9 Wheat. 738, 827 (1824)). *Accord Knauer v. United States,* 328 U.S. 654, 658 (1946) ("Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency.'") (*quoting Luria v. United States,* 231 U.S. 9, 22 (1913)).

This basic principle clearly encompasses the right to equal treatment under the laws in a criminal sentencing proceeding. *See United States v. Jacobson,* 15 F.3d 19, 22-23 (2d Cir. 1994) (status as naturalized citizen unconstitutional consideration in sentencing); *United States v. Schuman,* 127 F.3d 815, 818 n.* (9th Cir. 1997) (citing *Jacobson* with approval). Although there are some cases where a defendant's citizenship status and the wrongs he is convicted of may be "too related to be artificially separated for sentencing purposes," *United States v. Gomez,* 797 F.2d 417, 420 (7th Cir. 1986) (defendant's prior illegal entry into the United States from Colombia was properly considered in sentencing for distributing drugs from Colombia), that is not the case here. Petitioner, though born in Korea, is a naturalized citizen of the United States. The offenses at issue, serious though they may have been, were not made different by the fact that they also involved petitioner's country of origin. The United States was not injured to any greater extent because classified information was improperly disclosed by a naturalized citizen rather than a citizen by birth.

Enhancements based on a defendant's national origin are clearly impermissible. The sentencing approach endorsed

by the Fourth Circuit rests on a distinction between espionage defendants who are citizens by birth and espionage defendants who are naturalized citizens, and treats the latter more harshly than the former, simply by virtue of their oath of allegiance. This is an invidious discrimination of the most objectionable sort. Indeed, in the only instance where this Court has upheld disparate treatment of naturalized citizens on the basis of national origin, *Korematsu v. United States,* 323 U.S. 214 (1944), the holding was based specifically upon the unique conditions in time of war. The facts of this case are clearly distinguishable. Petitioner's sentence should have been no longer, or shorter, than one imposed on persons who gained citizenship by birth.

Swearing the oath of allegiance places naturalized citizens under the same obligations of loyalty as those of other citizens. Accordingly, violation of the duty of loyalty should bear no more weight for naturalized citizens than for citizens by birth. The rights acquired in the process of naturalization have been characterized as "'a priceless treasure.'" *Fedorenko v. United States,* 449 U.S. 490, 506 (1981) (*quoting Johnson v. Eisentrager,* 399 U.S. 763, 791 (1950)). The opinion of the court of appeals tarnishes this treasure by allowing courts to sentence more harshly based on the defendant's status as a naturalized citizen in violation of the Fifth Amendment.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SECOND, EIGHTH AND NINTH CIRCUITS.

By allowing the sentencing court to impose sentence based on violation of petitioner's oath of citizenship, the Fourth Circuit's decision condones "sending a message" to similarly situated naturalized citizens. This holding directly conflicts with three other courts of appeal which have

disapproved alienage status as a ground for imposing sentence. *See United States v. Leung,* 40 F.3d 577, 586 (2d Cir. 1994) ("Although deterrence is undoubtedly a proper consideration in imposing sentence, . . . a defendants' ethnicity or nationality may [not] legitimately be taken into account in selecting a particular sentence to achieve the general goal of deterrence"); *United States v. Jacobson,* 15 F.3d 19, 22-23 (2d Cir. 1994) (status as naturalized citizen unconstitutional consideration in sentencing); *United States v. Onwuemene,* 933 F.2d 650, 651 (8th Cir. 1991) (prohibiting imposing sentence based on alien status); *United States v. Borrero-Isaza,* 887 F.2d 1349 (9th Cir. 1989) (per curiam) (same).

In *Leung,* the trial court stated that it was imposing its sentence to deter others, "particularly others in the Asiatic community," from similar crimes. *See Leung,* 40 F.3d at 585. The Second Circuit rejected the notion that a defendant's nationality could be considered by a sentencing court in order to achieve the general goal of deterrence. The Court of Appeals not only reversed the sentence but also held that even the mere appearance of such a motivation warranted remand to a different judge for resentencing. *See id.* at 586-87. The Second Circuit affirmed this principle in *Jacobson,* stating that naturalized status cannot serve as the basis for determining a defendant's sentence. *See Jacobson,* 15 F.3d at 23.

Other courts of appeals have also rejected sentencing decisions based on a defendant's alienage status. The Eighth Circuit in *Onwuemene* rejected a sentence imposed on a permanent resident alien at the high end of the applicable sentencing guideline where the sentencing court remarked that defendant was not a citizen and that he had committed a crime even though "[t]his country was good enough to allow you come in here and to confer upon you . . . a number of the benefits of this society, form of government, and its opportunities . . . ." *Onwuemene,* 933 F.2d at 651. The

Eighth Circuit held that consideration of the defendant's alien status to impose a higher sentence was unconstitutional. *Id.*

Similarly, in *Borrero-Isaza,* the Ninth Circuit overturned a sentence where the lower court attempted to "send a message" to drug traffickers in Colombia by imposing a higher sentence on a defendant who was a Colombian national. *See Borrero-Isaza,* 887 F.2d at 1355. As in *Onwuemene,* the Ninth Circuit held that consideration of such a factor in sentencing could veil ethnic bias by focusing on a defendant's "geographical ties," and thus was constitutionally impermissible. *Borrero-Isaza,* 887 F.2d at 1356. Simply put, the defendant in *Borrero-Isaza* was under no greater duty than U.S. citizens to obey narcotics laws because of his citizenship in a country known as a source of illicit narcotics.

By contrast, the Fourth Circuit's opinion condones courts seeking to deter naturalized citizens from violations of loyalty, as if they were under a greater duty of loyalty than other citizens. The court in this case expressed concern for "the message that is sent out to others who might be in a similar situation" to the defendant, *i.e.* naturalized citizens who might be tempted to help the countries of their birth. This justifies imposing harsher sentences on defendants because of their naturalized status in an effort to deter others who are similarly situated. Such consideration of alienage status or national origin conflicts with the decisions of the Second, Eighth and Ninth Circuits. Certiorari should be granted to bring the Fourth Circuit into line with the decisions of its sister circuits and to vindicate the constitutional equality of those who have earned the "priceless treasure" of naturalized citizenship.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that his petition be granted.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
Eastern District of Virginia

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:97CR00117-001

v.

ROBERT C. KIM

Mark B. Sandground, Sr. & James G. Gore, Esquires
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1 of 1 Count Criminal Information

[ ] pleaded nolo contendere to count(s) which (was) (were) accepted by the court.

[ ] was found guilty on count(s)_____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:793(b)(g)	Conspiracy to obtain national defense information	September 1996	

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)_____

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHERED ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 579-68-3443	July 11, 1997 Date of Imposition of Judgment
Defendant's Date of Birth: 01-21-40	
Defendant's USM No.: 49756-083	Signature of Judicial Official
Defendant's Mailing Address: 20765 Bank Way Sterling, VA 20165	Leonie M. Brinkema U.S. District Judge Name & Title of Judicial Officer
Defendant's Residence Address: 20765 Bank Way Sterling, VA 20165	July 11, 1997 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 108 months with credit for time served.

[X] The court makes the following recommendations to the Bureau of Prisons:

DEFENDANT: ROBERT C. KIM Judgment Page 2 of 11
CASE NUMBER: 1:97CR00117-001

[X] The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____
Deputy Marshal

DEFENDANT: ROBERT C. KIM Judgment Page 3 of 11
CASE NUMBER: 1:97CR00117-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgement imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

Defendant shall not conduct business or enter into any business ventures or employment with any foreign governments.

Defendant shall surrender his passport and shall obtain no new passport or participate in any foreign travel without permission of the Probation Office.

Mandatory drug testing is waived but defendant shall submit to drug testing as may be required by the Probation Office.

DEFENDANT: ROBERT C. KIM Judgment Page 5 of 11
CASE NUMBER: 1:97CR00117-001

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DEFENDANT: ROBERT C. KIM Judgment Page 7 of 11
CASE NUMBER: 1:97CR00117-001

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ROBERT C. KIM Judgment Page 9 of 11
CASE NUMBER: 1:97CR00117-001

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
	$100.00		
Totals:	$100.00		

FINE

No fines have been imposed in this case.

RESTITUTION

Restitution has not been ordered in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:
(1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[X] in full immediately.

DEFENDANT: ROBERT C. KIM Judgment Page 10 of 11
CASE NUMBER: 1:97CR00117-001

All financial penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

DEFENDANT: ROBERT C. KIM Judgment Page 11 of 11
CASE NUMBER: 1:97CR00117-001

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence for abuse of a position of trust.

Guideline Range Determined by the Court:

Total Offense Level: 29

Criminal History Category: 1

Imprisonment Range: 87 to 108 months

Supervised Release Range: 2 to 3 years

Fine Range: $15,000 to $150,000

[X] Fine waived or below the guideline range because of inability to pay.

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	:	Criminal No. 97-117-A
	:	
vs.	:	Alexandria, Virginia
	:	July 11, 1997
ROBERT CHAEGON KIM,	:	9:00 a.m.
	:	
Defendant.	:	
	:	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	HELEN F. FAHEY, U.S. Attorney ROBERT C. CHESNUTT, AUSA U.S. Attorney's Office 2100 Jamison Avenue Alexandria, VA 22314
FOR THE DEFENDANT:	JAMES G. GORE, JR., ESQ. MARK R. SANDGROUND, SR., ESQ. The Gore Law Firm, P.L.C. 8000 Towers Crescent Drive Suite 600 Vienna, VA 22182

ALSO PRESENT:	S.A. GLORIA HARBOLD
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RMR, CRR U.S. District Court, Sixth Floor 401 Courthouse Square Alexandria, VA 22314 (703) 299-8595

(Pages 1 – 28)

COMPUTERIZED TRANSCRIPTION OF
STENOGRAPHIC NOTES

PROCEEDINGS

(Defendant present.)

THE CLERK: Criminal Action 97-117-A, the United States of America versus Robert Kim. This matter is on for sentencing. Are counsel present and ready, please.

MR. CHESNUT: Good morning, Your Honor. Robert Chesnut and United States Attorney Helen Fahey for the United States, with Special Agent Gloria Harbold of the FBI.

THE COURT: All right.

MR. SANDSGROUND: Good morning, Your Honor. Mark P. Sandground, Sr., and James G. Gore for the defense.

THE COURT: All right.

MR. SANDGROUND: Mr. Kim is here in open court.

THE COURT: All right. Counsel, as you know, this matter comes on for sentencing, and Mr. Sandground, have you and co-counsel and Mr. Kim had enough time to thoroughly go over the presentence report?

MR. SANDGROUND: We have, Your Honor.

THE COURT: All right. Then I will hear any argument you have to make. Now I have read your brief and your reply brief. As I understand it, there are two issues in dispute in this sentencing. First is that you disagree with the probation officer's assessment of a two-point enhancement to the offensive level, because the offense involved a violation – the offense involved an abuse of a position of trust under 3B1.3 of the guidelines; and then secondly, you have requested that there be a downward departure from the

guidelines because of exceptional circumstances. I believe those are the only two areas that you've actually raised, correct?

MR. SANDGROUND: You're absolutely correct. Your Honor. Your Honor, I'd like to divide my argument into two parts. I'd like to speak to Robert Kim the man. Mr. Gore would like to speak to the technical aspects of the sentencing. If we may divide that briefly, we will not be long, but we would both like to speak to the Court.

THE COURT: All right. I think that what you call the technical aspects, that is, the offense calculations themselves, should be addressed first, because we have to get the guideline range established before –

MR. SANDGROUND: Then may I ask Mr. Gore to speak first, Your Honor.

THE COURT: Yes. Mr. Gore?

MR. SANDGROUND: Thank you, Your Honor.

MR. GORE: Good morning, Your Honor. James Gore for Mr. Kim.

THE COURT: Good morning.

MR. GORE: It's a pleasure to be here this morning. I'd like to say as to the two-point guidelines increase for the abuse of position of trust, I would like to rest on the pleadings that we have filed previously.

I believe that there has been some recent law, there has been a Fourth Circuit decision in the past few months on this matter, and I think that the most recent case probably best speaks for itself that there is a three-prong test, and I believe that my pleadings speak on that, and I believe that the Court's probably had an opportunity to review that.

Next I'd like to move to the downward departure. I think that Mr. Kim is a very unique person coming before this Court, Your Honor. In my 17 years of criminal practice, I will tell you I have never seen a client that had such a good prior life to his offense. Mr. Kim at age 57, never even a parking ticket. He's been a good American, a good citizen. He has raised a beautiful family.

Now this in conjunction with the fact that he was a good employee and lost his employment, he has lost his pension, but more importantly, that he's actually given of his own financial resources to the community, when combined, this would give the Court an appropriate opportunity to consider a downward departure.

I think that this is an unusual case. We've presented unusual facts, and I would like to say that the downward departure argument that we've put forward in our pleadings is one of the most unique arguments that I've ever had the pleasure to make.

I have never seen somebody who has a history of so many prior good works. I've never seen anybody who has done such a good job raising his family. I have never seen anybody who has had such a clean, honorable record in his employment. Now I think that the Court needs to consider all of these downward departure factors together in their totality then considering the final sentence in Mr. Kim's case.

One, one final thing that I would like to, to state this morning is I was personally involved in the debriefing of Mr. Kim, and I sat through the majority of the debriefings with him, and I want to assure the Court that I personally spent a great deal of time with Mr. Kim going over each question, each area of interest of the CIA, the FBI, the ONI, the NSA, and I, I can tell the Court that from my own personal experience, I have seen that Mr. Kim has fully

and completely answered every single question put to him with the very, very best of his ability.

Now as far as the downward departure is concerned, I think that this is in the discretion of the Court. I think in the calculation of the two-point enhancement for the abuse of position of trust. I think that the Court can consider this through the pleadings that I've filed, but I feel as if the two-point enhancement has not fully been shown or proven by either the prosecution's brief or in the, in the presentence investigation.

I feel as if the calculation, the technical calculation in this case should be a level 30 offense to which Mr. Kim has pled guilty, and then I believe that he is entitled to his three points for cooperation and early cooperation. I believe that the calculation in this case should be a level 27 offense.

Plus, I think the Court should consider further downward departure from the guidelines based upon the factors that I have put forth. Thank you.

THE COURT: All right. Mr. Chesnut?

MR. CHESNUT: Your Honor, this case is a clear example of an abuse of a position of trust. When Mr. Kim went to work with the Office of Naval Intelligence, he was required to have an SCI clearance, top secret clearance, the highest government security clearance there is, in order to just have a job inside of the Office of Naval Intelligence.

The Court's seen the affidavit that we've filed with the Court that describes what special building the Office of Naval Intelligence is, how sensitive the materials are in that building, and what it means to have access to a building like that.

If you look right on the nondisclosure from that Robert Kim signed, he's required to sign this form in

order to have access to the classified information in that building. It says, "I understand that by being granted access to SCI information, special confidence and trust shall be placed in me by the United States government." It doesn't get any clearer than that.

And this clearance level, Your Honor, is a clearance level that the vast majority of government employees never have. So clearly, this is something that a special trust that he had that most government employees never have, the United States government trusted him with, and it was that security clearance that he used that enabled him to get to the documents in this case that he, in turn, passed to the Korean government.

The *Mackey* case, Your Honor, just sets out the factors that are already in the guidelines. There's nothing new in there. I'll point out that it does mention the, the idea of discretion and the ability to move in your job without oversight, and clearly Mr. Kim had unsupervised access to reams of classified information in his job. In fact, the very building he worked in was so secure and the reason the perimeter of the building is so secure is because so much classified information is available inside.

Not only that, he was trusted to leave the building every day with a briefcase and was not searched, and that is a special trust, Your Honor, that he abused in this case.

THE COURT: All right.

MR. CHESNUT: As for the downward departures, Your Honor, there is nothing that they have presented which is a valid factor recognized by this circuit for a downward departure. We don't question this, his good works, the fact that he has given money to his church and devoted time to charity, but these are things that Americans do all across this country every day.

And the fact that he is losing his job and his pension, it would be ironic if he were given somehow credit for that now. The reason he is here is because of a crime he committed against his employer. I mean, by definition, when you commit espionage, you are, of course, going to lose your security clearance, and you are going to lose your job. So that is something that is to be expected and is part of the crime in the case.

THE COURT: All right. On these first two matters, I'm going to rule as follows: I agree with the government's position that this is definitely a case where the two-point enhancement for abuse of a position of trust is definitely appropriate.

The *Mackey* case does not change the guidelines. The guidelines require the Court to look carefully at whether the defendant had special duties or special access to information not available to other employees on the basis of his particular position, and as the government correctly points out, Mr. Kim had a very high level, the highest type of level of security clearance.

By having that clearance, he had access to very unique and special information to which the average government employee does not have access, and that enabled him therefore to have the ability to get this information off the computer as quickly and easily as he did.

He was also able, as the government again says, to leave the building with some of this information. Had he been now in that special position of trust, he would not have been able to do so. His position – his security clearance and his position with ONI clearly enabled him to commit this offense, and I think it is appropriate that he has that two-level enhancement.

So the Court is going to use the level 29 offense level, which was the calculation in the presentence

report, and there is no question the defendant's criminal history is a level I, and the sentencing range therefore is 87 to 108 months. The supervised release period is two to three years, the fine range is $15,000 to $150,000, and there's a $100 special assessment, which I understand has been paid.

On the issue of downward departure, I'm not unsympathetic with the argument made by defense counsel that when a defendant stands before a court who has had an extensive life in the community, full of good works and honorable deeds, that somehow there ought to be more credit for that than there is recognized under the guidelines and case law. In fact, what happens if a person has no problems, then he gets the lowest criminal history, but if he has a superb background, it's very seldom he gets any credit for it.

In the *Rybicki* case, which is the Fourth Circuit case with which I am very familiar, since I was reversed in that decision, I looked at a series of about six factors, many of which are present in this case, in terms of that defendant's background, loyal service to this country, honorable service in the military. The gentleman had saved a human being's life and been awarded a very high civilian award from a foreign government, and other types of activities. And the Fourth Circuit felt that neither factor alone nor the totality of those factors, if added all together, as you're asking me to do in this case, are sufficient under the guidelines as they're written.

I think both *Koon,* which is Supreme Court case law, and *Rybicki,* which is the Fourth Circuit case law on this issue, have pretty much set the standards. A defendant, in order to get any downward departure for previous acts of good works, it would have to be so extraordinary that I have trouble envisioning what it would be any longer given these guidelines.

Therefore, I find that there is nothing within either the guidelines themselves or the law within the Fourth

Circuit that would given these facts enable the Court to do a downward departure. However, even if the Court could in this case, it would not be appropriate.

One of the things that caught my attention – and I want to assure counsel I have read what must be 30 or 40 letters from family and church members about Mr. Kim and his background, and I have no doubt that Mr. Kim has in the past made a very genuine contribution to the community and to his family, but I will tell you that the one piece of information in the background that just grabbed my attention was that among the places that Mr. Kim considered using for and meeting with his contact in order to pass these documents, which he clearly knew he should not have access to – should not have in a position where he's giving them to somebody else, was the very church where you say he has done such good work and the very church whose community members have been so strongly backing him.

The fact that he would consider any activity related to this espionage on that sacred land really got my attention. I think that is horrible hypocrisy, and I don't intend to give Mr. Kim any downward departure from the guideline range, all right?

Now I will hear within the guideline range allocution by counsel. Mr. Sandground?

MR. SANDGROUND: Thank you, Your Honor. And may it please the Court, the key note of this part of the sentencing must be to tell the Court that this is a sad time in the life of Robert Kim. Here in this open court today, there's great shame and degradation. He will express to you in a few moments his own sorrow.

This morning when I though why we are here today, I was struck, of course, by the hope that this Court might consider and temper justice with mercy. Mr. Kim is 57 years of age. He has a family, and he has lost it all

because of his own actions, and a man must stand strong and be responsible for his actions, and Mr. Kim is responsible. He does not deny that. It's the desolation of this man that has impressed me most.

In reality, there was a great deal of political naivete. His background, as the Court well knows, is from our great ally, South Korea, a nation that has prided itself for cooperation with the United States.

Some 35,000 American servicemen serve today South Korea defending democracy. Their lives have been placed in joint step with the lives of the Republic of Korea soldiers who stand every day to try to serve for freedom.

What Mr. Kim did was wrong, and for that he is mightily sorry. He was misguided. He did not have the intent to commit the kind of acts to which he's charged and to which he had pled guilty.

We recognize the Court's decision and prior good works, but I would like to tell the Court that Mr. Kim did accept the responsibility of his deeds, and in accepting that, he found a new faith. He stands before the Court ready to accept his punishment, but he hopes at the end of this ordeal that he will have an opportunity to come back again to this community and serve. He hopes that he will be able sometime to rejoin his family, to go back to his loving wife and his trusting children.

His brother is here today. His father is 82 years of age. His stepmother is 75. This is the first really blot of shame on this family, and he is very ashamed of what he has done.

There's very little that I can say to the Court in a legal argument on his behalf, but if you look at the presentence report and judge the full measure of the man, I don't believe that he is evil. I don't believe he is all bad.

Now the Court has at this time within the guidelines some discretion. That discretion was given by the sentencing guidelines so that the Court or any court could recognize that there are differences in defendants, there are differences in the psychodynamics of their makeup and in their offenses.

As counsel, we urge this Court to accept the sincerity of his sorrow, to accept the meaningfulness of his apologies, to translate that into a sentence within the lower ends of the guidelines. Thank you.

THE COURT: All right. Mr. Chesnut?

MR. CHESNUT: Your Honor, the defense has put in a lot of letters from individuals who talk about what a good man Robert Kim is, how much he's done for the church, how much he's done for the community and for his children. They paint a very compelling picture.

I've met his, his son and his wife, and I don't doubt that what they're saying is true, that Mr. Kim really did, in fact, do all these things and he was a good member of the community. That's a side to Robert Kim certainly that the community knows better than I do.

But there is another side to Robert Kim that I think the government knows better than all the people who wrote the letters to the Court, and that's the side of Robert Kim the individual who spied.

Now the defense doesn't want to call Robert Kim a spy. You'll notice that in over 100 pages' worth of pleadings, you never see them admit that Robert Kim spied or that – in fact, they specifically deny in some places that he has an agent of the South Korean government somehow. Instead, what they call him, and I'm quoting, they say that he is naïve, and they call him a victim manipulated by the clever South Korean intelligence officer, a naïve victim.

And, Your Honor, it's that theme, I think, that really falls flat, and it falls flat because we have the transcripts of the tapes of conversations between Robert Kim and his South Korean handler, Captain Baek Dong-il, and we've given the Court a number of those transcripts, and those transcripts show that Robert Kim is not a naïve victim.

They show that on March 20, 1996, Robert Kim walked into the Sheraton National Hotel in Arlington at night, alone, without Captain Baek, volunteered his services to the South Korean government, saying, "I am a Korean, I want to help Korea, and I want to do it now while I have access to all things that are classified."

And Robert Kim doesn't sound like a naïve victim on the tapes when he's talking to his South Korean handler and he's telling the South Korean handler to be careful with the documents and to make sure you shred them after I give them to you. That's Robert Kim speaking.

And whose idea was it to take the tops and bottoms off of all of these classified documents before passing them? The tapes show that idea was Robert Kim's. And in fact, as the Court noted earlier, it's Robert Kim's idea and he's the one that brought it up on the tapes to use his church as a place to drop off the classified documents to the South Koreans, and when Robert Kim is coming up with all of these ideas to be careful in the scheme and when he's showing up at the hotel at night, he doesn't sound much like a naïve victim to me.

Let's talk about Robert Kim's financial motive. The defense doesn't like it very much when we suggest that Robert Kim had a financial motive for what he did. They say that what he did was just a misguided effort to help South Korea, that we've got it all wrong. In fact, their pleadings come out and say Robert Kim's brother's company, COSCO, all they do is make ball bearings.

But if you look at the transcripts where Robert Kim is talking to his brother and Robert Kim is saying, "I'll go to work for your company. I'll go to work for COSCO," they're not talking about ball bearings. In fact, what they're talking about is building and servicing a multi-million-dollar coastal recognizance system that they can sell to the Korean government. That's Kim and his brother talking. And in fact, they specifically talk about doing is under the COSCO company name. And that's repeated over and over again in the transcripts.

In fact, when Robert Kim goes to Korea, flies to Korea to meet with South Korean naval officials about this program, COSCO pays for the trip. And when he returns and talks to his brother about the trip and the brother said, "Well, what happened? What's going on with the recognizance system, the naval recognizance system?" Robert Kim says, "I got top class hospitality in my meetings with the high-level naval officials," and he also says, "If I coach them, they'll do just as I say." That's a quote. "If I coach them, they'll do just as I say." That's Robert Kim speaking.

The truth is, Your Honor, Robert Kim, as you can see from the presentence report, was a man that had considerable debt, that was a couple of years away from retirement, and he was looking to cash in on what he had learned at the Office of Naval Intelligence through building a relationship with Korean naval officials, and to build that relationship which was critical to the business he wanted to do with them, he gave them the one thing that they really wanted, and the one thing they really wanted more than anything else was United States intelligence information.

Your Honor, the South Korean government had weighed in on the sentencing. I think there are something in the neighborhood of twenty-some-thousand signatures from a variety of South Koreans, a number of government officials, some high-level government officials.

I think there's a petition signed by the 100 members of the National Assembly of Korea. There's even a Saving of Robert Kim Committee, made up of high-level Korean officials, and they all ask for leniency.

They've got the same story. They say that Robert Kim – and I'm quoting again – was naïve and succumbed to the begging or enticement of Baek, but if you listen to the tapes, you don't hear any begging from Baek. You don't hear any enticements from Baek. In fact, all Capital Baek has to do is open up the envelopes that are stuffed full of classified documents.

And the South Korean government wants to act like it's somehow arm's length from what Captain Baek did, but in fact, the South Korean officials were meeting with Robert Kim in the hotel room in Arlington. The South Korean officials were meeting with Robert Kim in South Korea about the coastal recognizance project, and in fact, the South Korean officials were getting the classified documents that Robert Kim passed to Captain Baek.

They weren't saying this was Captain Baek. In fact, it's clear from the transcripts exactly what was happening with these documents. Robert Kim knew it. Captain Baek: "When I see the yellow envelope – the classified documents – when I see the yellow envelope sticking out of my mailbox, my eyes light up brightly. To tell you the truth, from the headquarters, many of cables of praises come to me and also of encouragement."

Kim says, "Ah, that's good."

Baek says, "So this is really important."

And they go on in other transcripts, when they talk about, "I'll share with you all the important things we're doing with the information you give us. Headquarters wants to know. The defense attache wants to know what the documents are."

So for now – for the South Korean officials to come in now with a Save Robert Kim Committee, if they were so concerned about saving Robert Kim, maybe they should have done something about it before he got caught. Maybe when Robert Kim showed up in the hotel room in Arlington, they should have thrown him out on the street and said, "You're an American, and you have responsibilities to the country of your citizenship," and maybe they should have stamped those envelopes Return to Sender and given them back.

They could have told him to stop. They could have told Baek to stop. They didn't do it. And they're only worried about saving Robert Kim now when Robert Kim got caught, and it's a little late for that.

And the South Korean officials, Your Honor, and all the officials in the Save the Robert Kim Committee, they should really not have a voice in what happens here today, Your Honor, because they're the beneficiaries of what Robert Kim was doing in this espionage conspiracy.

My last point, Your Honor, is I'd ask the Court to look at whether Robert Kim is really sorry for what he did or his sorry that he got caught, and a couple of things are interesting in this regard. First, Robert Kim's cooperation.

This is a man with a college degree, a graduate degree. We've sat with Robert Kim for over 40 hours, and he doesn't really seem to remember that much. We've learned precious little, and as the debriefers have explained – and the Court has some information about that – what they got they had to drag out of him, and in fact, it was only in very recent days, after Robert Kim was told how disappointed we were with his cooperation, that a little more information has come out, a little bit that's been useful.

In fact, just yesterday he made some new admissions to us about some things, and when he was asked, "Where was this in the last 40-some hours?" he admitted he had been holding that back to protect family members.

If he really wanted to cooperate and he was really sorry, we shouldn't have to have dragged information out of him in long debriefings, Your Honor. He should have come forward with it willingly and told us exactly what classified information was passed so that we could really assess the damage to national security.

Your Honor, if you're looking as to whether Robert Kim is really sorry, the last page of the defense pleadings is the place I guess you'd look for it and expect to see it the most. That's the letter that Robert Kim wrote to the Court.

And if you look on that page, he says he's not a spy or an agent of the South Korean government, which is rather telling, but it's actually, the letter is a lot more telling for what's not in there. If you look in that one-page letter, who does he single out to apologize to? It's rather interesting. He doesn't apologize to all the people in the United States who worked to give him – to grant his application for citizenship, give him a place to come over and have an education and to start a new life. He doesn't apologize to the federal agencies, like the CIA, the DOD, the agencies whose documents were actually compromised in this case, and he doesn't apologize to his colleagues at the Office of Naval Intelligence, the people he worked with for 19 years, the people who trusted him.

He apologizes to Korean Americans. That's his words. He wants to single out Korean Americans for his apology, Korean Americans.

Your Honor, Robert Kim owes an apology to all Americans, all nationalities and races, and he owes us that

apology, Your Honor, because he put his love for another country ahead of a much greater responsibility, not the responsibility just to his employer at the Office of Naval Intelligence, but his responsibility to the United States as a citizen of this country.

He owes this country his complete loyalty and fidelity, and he betrayed us. He betrayed all of us, including Korean Americans. He damaged the national security of the country that gave him citizenship, and for that betrayal, Your Honor, he deserves the toughest sentence that this Court can give him today.

THE COURT: All right. Mr. Kim is there anything you'd like to say before sentence is imposed?

THE DEFENDANT: Your Honor, thank you very much for this opportunity to communicate to you my present thoughts and feelings. First of all, I have to say that I am very sorry for horrible mistake I made. I am quite cognizant of the fact that I crossed a line that I was not supposed to have been crossed.

I, however, was not and am not a spy or an agent, agent for South Korea, like he said. I assure you that. There will be no chance of me making such a horrible and grave mistake again in my future life.

I accept the total responsibility for violating the privileges of the citizens and the privileges of clearance for many years by the United States government.

I accept punishment, although I wish the level of punishment to be appropriate and reasonable. I believe that being detained in the detention center for nine-and-a-half months has been for me a tremendous lesson in itself.

What has kept me spiritually and mentally strong through these past several months are the words in the Bible. The Bible says that – excuse me – through many

tribulations, we enter the kingdom of God. Following the tribulations, which are soon to be in the form of a long-term, look like it is long-term incarceration, I believe that my happiness and peace and hope awaits me late in my life.

The Bible also says that God will not remember or keep count of mistakes if one admits to one's mistake and repents. I admit that I made a mistake, and I continuously repent. I believe that God will forgive me or has already forgiven me.

I also want to apologize to everybody, including my colleagues for my 19 years' service there, and to all those people who spent extra time for debriefing. I really apologize. And also, I apologize here in front of the Court to those who have been hurt by my stupidity and naivete.

I especially again want to apologize to many Korean Americans, who have worked hard to establish a solid and honest foundation for themselves and their families. I am truly sorry.

I would also like to resume helping the many underprivileged people in this area as soon as possible. I know of the lives of the homeless people in Washington, D.C. I know of the lives of the children with mental retardation in Fairfax, Virginia. I know of the lives of those in homeless shelters in Arlington, Virginia. There are many people who need the love of God. These are many people who need my humble help. I will continue to miss them.

Lastly, since I have been detained, I have many – I have missed many special family occasions, including the graduation ceremonies at the University of Virginia, where my youngest daughter graduated with her honor of distinction. Excuse me. And it is apparent that I will also be missing my only son's wedding in October and my 30th wedding anniversary in August.

It is my most fervent prayer to God that I will be able to reunite with my family as early as possible, to maintain and fulfill my duty as a father and a husband. Thank you, and God bless you, Your Honor.

THE COURT: All right, Mr. Kim. Mr. Kim, your lawyer began by saying this is a sad time in your life. I think that may be an understatement. It's a tragic time in your life, in the life of your family, and in the life of this country.

People like you ought not to be standing before a court such as this one, convicted of the kind of crime for which you have been convicted. It is absolutely tragic. But it is a fact that none of us can change. What was done was done, and now it has to be treated in an appropriate manner.

I cannot accept the argument that you and your counsel have said consistently that this was the act of naivete or that you were a victim of somebody else's activities. I have listened – not listened, but I've read the transcripts, and I'm satisfied that when the activities were going on, you knew what you were doing. You may not have had the evil purpose of hurting the United States directly, but you had to have understood that it could not benefit the United States.

You had taken an oath of allegiance to this country when you became a citizen, and in part of that oath, because I administer it to, that oath to new citizens many times a year, you know, it's a two-part oath. It's – the first part is the cutting off of obedience to the foreign country of birth. The new part of the oath is accepting the new life as an American citizen.

And in fact, I normally tell citizens at the naturalization ceremony that I appreciate the sadness and joy

of that day. It's a mixed day, because it is cutting off forever certain loyalties and is accepting new loyalties.

And you breached that oath that you took many years ago, and as the government has argued at other proceedings, you then breached other oaths in terms of your promise to abide by the requirements of secrecy and those sorts of things. So it is a tragic day.

In sentencing you, I have looked at all these factors. I have looked at you, Robert Kim the person, but I have to also look at the criminal activity itself that you committed. The Court must take into consideration as well the message that is sent out to others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States. If that were permitted, all of the secrecy, all of the intelligence community in this country would be significantly impaired, and that can't be permitted.

I am therefore sentencing you, having considered all these factors, to the high end of the guideline range. It will be the sentence of the Court that you be committed to the custody of the Bureau of Prisons for a period of 108 months. You will get credit for time served against that 108 months.

And I will recommend to the Bureau of Prisons that they make every effort to send you to a facility as close to this area as possible so that it will be easy for your family to visit you, but you need to understand I have no control over where that designation will be. It is possible your attorneys may be able to work with the U.S. Attorney as well in getting some accommodation in that respect.

At the completion of the 108-month sentence, you will be placed on three years of supervised release. The terms and conditions of the supervised release are first of all your uniform good behavior. That means you cannot violate

any federal, state, or local laws while under supervision. Do you understand that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now there will be some special conditions of supervised release that I want to make sure you listen to with great care. Under Section 18 – I'm sorry, Section 3583(d) of Title 18, you will be prohibited during the period of supervised release from engaging in any business venture, contractual agreement, or other employment as a computer programmer, specialist, or consultant with any foreign government, either directly or indirectly. Are you clear about that limitation?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. You must surrender, if you have not already done that, any passport that you have, and you'll not be permitted to get a new passport nor engage in any foreign travel during the period of supervised release unless that has been cleared in advance with the Court.

For example, I know you have elderly parents in Korea. If there were some family emergency and you needed to go home during the period of supervised release. I will certainly consider that, all right?

THE DEFENDANT: Thank you very much, Your Honor.

THE COURT: All right. Given your financial situation and the fact that you will be incarcerated for a period of time, I find that you are unable to afford any fine in this case, nor can you afford to pay the costs of incarceration or supervision. So those will not be imposed. And the $100 special assessment has been paid, so we don't need to worry about that.

Mr. Chesnut, is there anything further the United States would require or request in this sentence?

MR. CHESNUT: No, Your Honor.

THE COURT: All right. Mr. Sandground or Mr. Gore, is there anything else you want the Court to address in the sentence?

MR. SANDGROUND: No, Your Honor.

THE COURT: All right. Then, Mr. Kim, you're remanded into the custody of the United States marshal, to begin serving your sentence. Thank you.

All right, we'll recess court for five minutes, and then we'll continue the docket.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

_____

Anneliese J. Thomson

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

January 14, 1999

TO: Robert Clifford Chestnut, Esq.
Mark H. Lynch, Esq.
Patrick S. Kim, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s):97-4606

The Court's decision is enclosed.

* * *

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	:	No. 97-4606
v.	:	
ROBERT CHAEGON KIM, *Defendant-Appellant.*	:	

Appeal from the United States District Court
For the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CR-97-117-A)

Submitted: December 22, 1998

Decided: January 14, 1999

Before ERVIN, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

COUNSEL

James G. Gore, Vienna, Virginia; Mark H. Lynch, Patrick S. Kim, COVINGTON & BURLING, Washington, D.C. for Appellant. Helen F. Fahey, United States Attorney, Robert C. Chesnut, Assistant United States Attorney, Alexandria, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36.

OPINION

PER CURIAM:

Robert Chaegon Kim pled guilty to an information charging him with conspiracy to obtain national defense information, *see* 18 U.S.C.A. § 793 (West 1976 & Supp. 1998), while he was employed by the Office of Naval Intelligence. He was sentenced to 108 months imprisonment. In his plea agreement, Kim waived his right to appeal any sentence within the statutory maximum "on any ground whatever." His attorney has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), raising several issues relating to the sentence but stating that in his view there are no meritorious issues for appeal. Kim has filed a pro se supplemental brief in which he contests his sentence on additional grounds and asserts that he received ineffective assistance of counsel. After a thorough review of the record, we affirm in part and dismiss in part.

A defendant may waive the right to appeal his sentence if the waiver is knowing and intelligent. *See United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995). A waiver is valid and enforceable if the district court

questions the defendant about it during the Fed.R.Crim. P. colloquy. *See United States v. Wessells,* 936 F.2d 165, 167-68 (4th Cir. 1991). A waiver does not preclude the defendant from appealing a sentence which is in excess of the statutory maximum or base don constitutionally impermissible factors. *See United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). Here, the district court discussed the waiver provision with Kim at the Rule 11 hearing, explained that he would be able to appeal only an illegal sentence, and further explained what would constitute an illegal sentence. Kim assured the court that he understood that he was waiving his right to appeal. We find that the waiver was valid and thus do not address the claims made in the supplemental brief concerning the calculation of the guideline range, the district court's imposition of sentence at the high end of the range, and the disparity between Kim's sentences imposed on others convicted of similar offenses. Because it does not conclusively appear from the record that Kim's attorneys rendered ineffective assistance of counsel at sentencing, his claim of ineffective assistance should be raised in a motion to vacate sentence pursuant to 28 U.S.C. § 2255 (1994), rather than in his direct appeal. *See United States v. Smith*, 62 F.3d 641, 651 (4th Cir. 1995).

In the *Anders* brief, defense counsel suggests that the district court considered constitutionally impermissible factors were present which would permit a departure below the guideline range, the court added that, even if a departure were possible, it would not be appropriate. The court then commented on the fact that Kim considered using his church as a place to pass classified documents to a South Korean military attache, and deemed Kim's attitude "horrible hypocrisy." Counsel argues that the remark indicates that the court chose not to depart because Kim offended the court's own "personal sense of religiosity." *See United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991) (judge's religion may not be factor in sentencing). We

find no constitutional violation in the court's comment, which was made after the court had already decided not to depart.

Counsel also maintains that the court improperly considered Kim's status as a naturalized citizen when it imposed sentence at the high end of the guideline range. The court discussed the oath of allegiance that it taken by naturalized citizens and the oath Kim took to abide by the secrecy requirements of his job with the Office of Naval Intelligence. The court then stated that it felt it "must take into consideration [in addition to Kim's personal qualities and prior good works] the message that is sent out to others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States." Our review of the record discloses that the court's concern was the seriousness of Kim's violation of his oaths rather than his national origin or immigration status. Consequently, we find no error.

Last, counsel argues that the district court mistakenly believed that a departure on the basis of Kim's charitable works was foreclosed by *Koon v. United States*, 518 U.S. 81 (1996), and *United States v. Rybicki*, 96 F.3d 754 (4th Cir. 1996). This issue is not properly raised on appeal because all non-constitutional claims relating to the sentence were waived.

In accordance with *Anders*, we have examined the entire record in this case and find no reversible error. We therefore affirm the conviction and sentence. We dismiss that portion of the appeal which challenges the sentence on other than constitutional grounds. This court requires that counsel inform his client, in writing, of his right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in his court for leave to withdraw from

representation. Counsel's motion must state that a copy thereof was served on the client. We dispense with oral argument because the facts and legal contentions are adequately presented in the record and briefs, and oral argument would not aid the decisional process.

AFFIRMED IN PART, DISMISSED IN PART

Your Honor,

Thank you very much for this opportunity to communicate to you my present thoughts and feelings. First of all, I have to say that I am very sorry for the horrible mistake I made. I am quite cognizant of the fact that I crossed a line that was not supposed to have been crossed. I, however, was not and am not a spy or an agent for South Korea. I assure you that there will be no chance of me making such a horrible and grave mistake again in my future.

I accept the responsibility for violating the privileges of citizenship granted to me for many years by the United States Government. I accept punishment, although I wish the level of punishment to be appropriate and reasonable. I believe that being detained in a detention center for nine and a half months has been, for me, a tremendous lesson in itself.

What has kept me spiritually and mentally strong through these past several months are the words in the Bible. The Bible says that through many tribulations, we enter the Kingdom of God (Acts 14:22). Following the tribulations which are soon to be in the form of a long term incarceration, I believe that happiness, peace and hope await me later in my life. The Bible also says that God will not remember or keep count of mistakes if one admits to one's mistakes and repents. I admit that I made a mistake and I continuously repent. I believe that God will forgive me.

I also want to apologize here in front the Court to those who have been hurt by my stupidity and naivete. I especially want to apologize to the many Korean Americans, who have worked hard to establish a solid and honest foundation for themselves and their families. I am truly sorry.

I would also like to resume helping the many underprivileged people in this area as soon as possible. I know of the lives of the homeless people in Washington, D.C. I know of the lives of children with mental retardation in Fairfax, Virginia. I know of the lives of those in the homeless shelter in Arlington, Virginia. These are many people who need the love of God. These are the many people who need my humble help. I will continue to miss them.

Lastly, since I have been detained, I have missed many special family occasions, including the graduation ceremonies at the University of Virginia, where my youngest daughter graduated with the honor of distinction. And it is apparent that I will also be missing my only son's wedding in October and my 30th wedding anniversary in August. It is my most fervent prayer to God that I will be able to reunite with my family as early as possible to maintain and fulfill my duty as a father and a husband.

Thank you and God Bless you, Your Honor

Supreme Court, U.S.
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(2)

No. 98-1651

In the Supreme Court of the United States

ROBERT C. KIM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's sentence was based on his status as a naturalized citizen.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 39a-43a) is unpublished, but the judgment is noted at 172 F.3d 45 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1999. The petition for a writ of certiorari was filed on April 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Eastern District of Virginia, petitioner pleaded guilty to conspiracy to obtain national defense information, in violation of 18 U.S.C. 793(b) and (g). He was sentenced

to 108 months' imprisonment. The court of appeals affirmed. Pet. App. 39a-43a.

1. Petitioner was born in Korea in 1940, moved to the United States in 1966, and became a naturalized citizen in 1974. In 1978, the Office of Naval Intelligence hired petitioner as a computer specialist. Petitioner had a high level security clearance that gave him access to secret national defense information. Gov't C.A. Br. 3.

In 1996, while under surveillance by the FBI, petitioner met with Korean officials in Arlington, Virginia, to volunteer his services to that government. During the summer of 1996, the FBI observed petitioner in his office as he, without authorization, printed from his computer classified information relating to Korea. Petitioner then mailed the documents to a Korean Naval attache. The FBI intercepted the documents, copied them, then replaced them for delivery to the attache. The FBI also intercepted petitioner's incriminating telephone conversations with the attache. Gov't C.A. Br. 3-4.

In May 1997, petitioner agreed to plead guilty to a one-count information charging him with conspiracy to obtain national defense information. As part of the plea agreement, petitioner waived his right to appeal any sentence within the ten-year statutory maximum. Gov't C.A. Br. 2.

2. At sentencing, petitioner's counsel asked for leniency, stating that petitioner was politically naive. He stated that petitioner was originally from South Korea and that American soldiers were currently stationed in Korea to protect democracy. Pet. App. 24a. In response, the prosecutor argued that petitioner did not deserve leniency. Referring to a letter that petitioner had written the court, the prosecutor stated that

petitioner had apologized only to Korean-Americans, not to the American people who gave him citizenship or to the federal government that he betrayed. The prosecutor argued that petitioner owed this country his complete loyalty and fidelity, but that he had betrayed the American people, including Korean-Americans. The prosecutor asked for a substantial sentence because petitioner damaged the national security of the country that gave him citizenship. *Id.* at 30a-31a.

During allocution, petitioner said that he was not a spy, but stated that he was accepting responsibility "for violating the privileges of the citizens and the privileges of clearance for many years by the United States government." Pet. App. 31a.

Before imposing sentencing, the district court addressed petitioner. The court rejected petitioner's attempt to portray himself as a naive victim of others. The court noted that petitioner had taken an oath of allegiance to this country; that he had breached that oath and "other oaths in terms of your promise to abide by the requirements of secrecy and those sorts of things." Pet. App. 34a. The court continued:

> In sentencing you, I have looked at all these factors. I have looked at you, Robert Kim the person, but I have to also look at the criminal activity itself that you committed. The Court must take into consideration as well the message that is sent out to others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States. If that were permitted, all of the secrecy, all of the intelligence community in this country would be significantly impaired, and that can't be permitted.

Ibid. Stating that it would sentence petitioner at the high end of the Guideline range, the court imposed a sentence of 108 months' imprisonment and three years' supervised release. Petitioner did not object to the court's sentence. *Id.* at 34a-35a.

3. The court of appeals affirmed in part and dismissed in part in an unpublished per curiam opinion. Pet. App. 39a-43a. The court of appeals dismissed petitioner's challenges to his sentence based on the Sentencing Guidelines because of the provision in the plea agreement waiving his right to appeal any sentence within the statutory maximum. *Id.* at 40a-41a.[1] The court ruled, however, that the waiver provision did not bar petitioner from challenging a sentence that was based on constitutionally impermissible factors. *Id.* at 41a. The court then considered and rejected petitioner's claims that the sentencing court based its sentence on its "personal sense of religiosity" or on petitioner's national origin. *Id.* at 41a-42a.

With respect to the national origin claim, the court of appeals observed that the district court had "discussed the oath of allegiance * * * taken by naturalized citizens and the oath [petitioner] took to abide by the secrecy requirements of his job with the Office of Naval Intelligence," and had indicated that it must consider the "message" the sentence would send to "others who might be in a similar situation and think it's not so bad to help another country even if I breach an oath to the United States." Pet. App. 42a. The court of appeals concluded that, based on the record, the district court's

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[1] The court of appeals also declined to address petitioner's claim of ineffective assistance of counsel on the ground that petitioner should bring that claim in a separate motion under 28 U.S.C. 2255. Pet. App. 41a.

"concern was the seriousness of [petitioner's] violation of his oaths rather than his national origin or immigration status." *Ibid.* Consequently, the court found "no error" in the challenged remarks. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the sentencing court based its sentence on his natural origin or immigration status in violation of the equal protection guarantee of the Fifth Amendment. That fact-bound contention lacks merit.

The Fifth Amendment bars a sentence that is based on the defendant's national origin or alienage. See, *e.g.*, *United States* v. *Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991). Similarly, the Sentencing Guidelines do not permit sentencing on the basis of national origin. See 28 U.S.C. 994(d) (directing sentencing commission to promulgate Guidelines that are "entirely neutral" as to, among other things, national origin); Sentencing Guidelines § 5H1.10 (1997). A district court may refer, however, to the defendant's national origin or naturalized status at sentencing as long as the defendant's alienage is not the basis for the sentence. *United States* v. *Webster*, 54 F.3d 1, 7 (1st Cir. 1995); *United States* v. *Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994); *United States* v. *Munoz*, 974 F.2d 493, 495-496 (4th Cir.), cert. denied, 506 U.S. 1039 (1992); *United States* v. *Gomez*, 797 F.2d 417, 420-421 (7th Cir. 1986).

The court of appeals correctly concluded that petitioner's alienage was not the basis for the sentence imposed by the district court. The district court explained that petitioner's espionage breached his oath of allegiance as a naturalized citizen and thus his duty of loyalty to his country. Pet. App. 34a. The district court's point was that petitioner's crime was incon-

sistent with his duties as a citizen, however acquired. Thus, although the court referred to the manner in which petitioner acquired his citizenship, it did not base its sentence on that fact. Likewise, the district court's statement that it intended to send a message to those in a "similar situation" referred simply to others who might be tempted to breach an oath of loyalty to this country. See *United States* v. *Munoz*, 974 F.2d at 495-496 ("The court may also impose a sentence to deter similar criminal conduct by others."); *United States* v. *Gomez*, 797 F.2d at 420 (court properly "expressed concern * * * about the increasing numbers of people from Latin countries bringing illegal drugs into the district" and "expressed the hope that the sentence imposed would serve as a deterrent to others" similarly situated).[2]

2. Contrary to petitioner's contention (Pet. 8-10), the court of appeals' decision does not conflict with the decisions of other courts of appeals. Petitioner relies on appellate decisions that have found, on different factual records, that the sentencing court improperly relied on the defendant's alienage in sentencing. See *United States* v. *Leung*, 40 F.3d 577, 585 (2d Cir. 1994) (appearance of impropriety caused when district court stated that "[w]e have enough home-grown criminals in the United States without importing them"; sentence was intended to "deter others, particularly others in the Asiatic community"; and "people [who] want to come to the United States * * * had better abide by our

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[2] Petitioner's failure to object to the district court's comments at sentencing also suggests that, contrary to the position he took on appeal, he did not view the comments at the time as reflecting an intent to sentence him based on his national origin or citizenship. Cf. *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988).

laws"); *United States* v. *Onwuemene*, 933 F.2d at 651 (district court stated that high sentence was warranted because defendant was "not a citizen of this country" and "[w]e have got enough criminals in the United States without importing any"); *United States* v. *Borrero-Isaza*, 887 F.2d 1349, 1351-1357 (9th Cir. 1989) (district court repeatedly stated that sentence was influenced by the fact that the defendant was a "foreigner"). Here, the court of appeals reviewed the record in this case and found that the district court sentenced petitioner based on "the seriousness of [his] violation of his oaths rather than his national origin or immigration status." Pet. App. 42a. That fact-bound holding does not conflict with those decisions and does not merit further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ROBERT C. KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Although respondent claims that the issue presented is "fact-bound" and lacks merit, respondent concedes that a criminal sentence based on a defendant's status as a naturalized citizen is constitutionally impermissible. Respondent also agrees that such a constitutional violation in petitioner's sentencing is appealable. Accordingly, the legal basis for this petition is undisputed.

Citing some of the same cases cited by petitioner, respondent concedes the core issue of petitioner's argument: that a criminal sentence based on defendant's status as a naturalized citizen is barred both by the Fifth Amendment and by the Sentencing Guidelines themselves. *See* Brief for the United States in Opposition ("Opp. Brief") 5. However, respondent's description of the issue presented merely parrots the holding of the Court of Appeals, *i.e.* that the basis for petitioner's sentence was not his status as a naturalized citizen, but rather the fact that he breached his oath of allegiance as a naturalized citizen. *See* Opp. Brief 5 (citing the opinion of the Court of Appeals at the Appendix to the Petition ("Pet. App.") 34a). Thus, respondent attempts to cast the controversy as a mere factual dispute not worthy of this Court's review.

To the contrary, the district court's statements are perfectly clear, and there is no factual dispute that petitioner's sentence was based, at least in part, on the violation of his oath of allegiance – an oath that only naturalized citizens are required to take. Accordingly, petitioner's sentence was based on his status as a naturalized citizen. The issue is not one of fact, but whether such a conceded constitutional violation merits this Court's review.

As explained in the Petition, the purported distinction between the citizenship oath and status as a naturalized citizen overlooks the fact that every naturalized citizen takes the same oath to uphold the laws of the United States. As a consequence, any naturalized citizen convicted of violating a law of the United States could be sentenced more harshly for breaking this oath. The net effect of the Court of Appeal's opinion is to affirm sentencing naturalized citizens based on their status, in clear violation of the constitutional principles conceded by respondent in its brief.

Rather than a fact-bound question, the decision of the Court of Appeals raises an important issue of constitutional law regarding the rights of naturalized citizens sentenced under the criminal laws of the United States. Left unexamined, the decision of the Court of Appeals threatens the basic equality of naturalized citizens under law protected by the Constitution and affirmed time and again by decisions of this Court. That question, therefore, clearly warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition be granted.

Respectfully submitted,

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